IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-635

WILLIAM C. FRIDAY, Individually, and as President of the University of North Carolina, et al., *Petitioners,*

v.

LAWRENCE A. UZZELL and ROBERT LANE ARRINGTON, Individually, and upon behalf of all others similary situated, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

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Petitioners,

v.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals of the Fourth Circuit entered in this proceeding on July 28, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit "On Petition Of Appellees For A Rehearing In Banc" entered July 28, 1977, is not yet reported and is printed as Appendix A to this Petition. The opinion of the panel of the Court of Appeals for the Fourth Circuit is reported at 547 F.2d 801 and is printed as Appendix B to this Petition. The opinion of the District Court for the Middle District of North Carolina is reported at 401 F. Supp. 775 and is printed as Appendix C to this Petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., § 1254 (1).

QUESTIONS PRESENTED

I. WHETHER STUDENT GOVERNMENT REGULATIONS AT A STATE UNIVERSITY WHICH REQUIRE THE STUDENT BODY PRESIDENT TO APPOINT TWO BLACK MEMBERS TO THE CAMPUS LEGISLATURE IN THE EVENT TWO ARE NOT ELECTED, AND WHICH PERMIT AN ACCUSED BEFORE THE CAMPUS DISCIPLINARY COURT TO REQUEST THAT FOUR OF THE SEVEN JUDGES HEARING THE CASE BE MEMBERS OF HIS OR HER RACE AND/OR SEX ARE REGULATIONS WHICH HAVE HARMED OR DEPRIVED TWO WHITE STUDENTS AT THE UNIVERSITY SUCH THAT: (1) THEY ARE DENIED EQUAL PROTECTION OF THE LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION: AND (2) THEY HAVE STANDING TO SUE AND PRESENT A JUSTICIABLE CASE OR CONTROVERSY FOR DETERMINATION.

II. WHETHER THE DECISION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT REVERSING THE DISTRICT COURT'S SUMMARY JUDGMENT IN FAVOR OF THE PETITIONERS AND GRANTING SUMMARY JUDGMENT FOR THE RESPONDENTS, IN A SITUATION WHERE THE PETITIONERS HAD, PRIOR TO TRIAL ON THE MERITS, MOVED FOR SUMMARY JUDGMENT ON THE QUESTIONS OF MOOTNESS AND STANDING, DENIED TO THE PETITIONERS PROCEDURAL DUE PROCESS OF LAW AND AN OPPORTUNITY TO PRESENT EVIDENCE SUPPORTIVE OF THE CHALLENGED REGULATIONS.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The equal protection clause of the Fourteenth Amendment provides:

> "No state shall... deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. 2000d:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from

participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

University of North Carolina Student Constitution, Art. I, § 1.A-D:

ARTICLE I. LEGISLATURE

§ 1. CAMPUS GOVERNING COUNCIL

A. Supreme legislative power in the Student Body is vested in a Campus Governing Council (hereinafter referred to as "Council.")

B. COMPOSITION. The Council shall be composed of 20 elected Councillors, the President of the Student Body as a voting *ex-officio* member, and not to exceed four appointed Councillors if necessary to comply with Section 1.D. of this Article.

C. ELECTION. The elected members of the Council shall be chosen during the election in the Spring Semester, to serve one year, and until their successors are elected.

D. MINORITY REPRESENTATION. To ensure there be a protective representation of minority races and both sexes on the Council, at all times there shall be at least two Councillors of a minority race within the Student Body (if any), two male Councillors, and two female Councillors. If at any time the requirements of this section are not fulfilled, the President of the Student Body, with the consent of the Council, shall make the number of appointments necessary to ensure compliance with this section, PROVIDED that any such appointment shall take effect unless rejected by the Council within 10 days of submission. All appointed Councillors shall have the same rights, privileges, and duties of elected Councillors and shall serve for the remainder of the term of the Council. No appointments made necessary by the results of a Spring Election shall be submitted to other than the Council newly elected.

The Instrument of Judicial Governance For the University of North Carolina at Chapel Hill, IV, E.2.e. (2):

IV. E. 2. e. 2) If requested by the defendant, provision shall be made for racial or sexual representation (but not both) on the trial court, as follows:

a) At least four of the seven members of the trial court shall be of the same sex as the defendant;

b) When a defendant is not a member of the majority race, at least four of the seven members of the trial court shall not be of the majority race;

c) When a defendant is a member of the majority race, at least four of the seven members of the trial court shall be of the majority race.

STATEMENT OF THE CASE

On June 15, 1974, two White students at the University of North Carolina at Chapel Hill brought an action in District Court seeking to nullify certain University and student government practices as being racially discriminatory and in violation of the Fourteenth Amendment, the Civil Rights Act of 1871, 42 U.S.C. 1983, and the Civil Rights Act of 1964, Title VI, 42 U.S.C. 2000d. The suit charged that the University engaged in three separate practices which are prohibited by the Civil Rights Acts and the Constitution. The challenged practices were as follows: (1) The disbursement of funds collected from mandatory student fees to the Black Student Movement (BSM), a group composed exclusively of black students whose membership policies were allegedly discriminatory and whose purpose was allegedly the promotion of a separate racial and cultural identity; (2) a provision of the Student Constitution which required that there be at least two Blacks, two women and two men on the Campus Governing Council (CGC), and if this number were not elected, a provision requiring the President of the Student Body

to appoint additional members to the CGC in order to meet the representative requirements of the Student Constitution; and (3) a provision in the campus judicial code which provided that, upon request of a defendant before the Student Honor Council (SHC) (a judicial body entrusted with trial and punishment powers in matters of student discipline), four of the seven judges appointed to hear the case will reflect the defendant's race and/or sex.

The drafters of the Student Constitution had provided that a minimum number of Blacks sit on the Campus Governing Council so as to ensure a broad representation of the diverse groups on campus. The purpose of the provision in the judicial code allowing the defendant to request that four of the seven judges sitting on a case reflect his or her race and/or sex was to ensure that justice was not only done, but was perceived to have been done.

After the parties had engaged in considerable discovery, but prior to the presentation of any evidence concerning the reasons and the effect of the challenged practices, the Petitioners moved for summary judgment. The District Court granted motion for summary judgment to the Petitioners. The Court held that the claims relating to the BSM were moot in that the BSM had opened its membership to all students, and the Court was assured that discrimination would not reoccur. The Court held that the actions regarding the CGC and the SHC presented no justiciable case or controversy.

The Respondents appealed. The Court of Appeals for the Fourth Circuit affirmed the summary judgment in favor of the Petitioners as to the financial support of the BSM, but reversed the summary judgment rulings on the questions of minority representation on the CGC and the SHC, and remanded with directions that the District Court enter summary judgment for Respondents on these two issues. This was done notwithstanding the fact that Petitioners had not been given an opportunity to present evidence pertaining to the need for remedial measures and notwithstanding the fact that Respondents did not move for summary judgment. In reversing the District Court, the Court of Appeals held that "without either reasonable basis or compelling

interest, the composition of the Council (and the Honor Court) is formulated on the basis of race."

A timely petition for rehearing was made on January 24, 1977, and was allowed. Upon rehearing *in banc,* an order was issued affirming the three judge panel decision subject to certain additions. Judges Winter, Haynsworth and Buzner dissented.

The Petitioners applied for a stay of mandate on August 12, 1977, and on September 30, 1977, the Court of Appeals for the Fourth Circuit ordered the mandate stayed pending the disposition of this Petition.

REASONS FOR GRANTING THE WRIT

I. STUDENT GOVERNMENT REGULATIONS AT A STATE UNIVERSITY WHICH REQUIRE THE STUDENT BODY PRESIDENT TO APPOINT TWO BLACK MEMBERS TO THE CAMPUS LEGISLATURE IN THE EVENT TWO ARE NOT ELECTED, AND WHICH PERMIT AN ACCUSED BEFORE THE CAMPUS DISCIPLINARY COURT TO REQUEST THAT FOUR OF THE SEVEN JUDGES HEARING THE CASE BE MEMBERS OF HIS OR HER RACE AND/OR SEX ARE REGULATIONS WHICH HAVE NOT HARMED OR DEPRIVED TWO WHITE STUDENTS AT THE UNIVERSITY SUCH THAT: (1) THEY ARE DENIED EQUAL PROTECTION OF THE LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION; AND (2) THEY HAVE STANDING TO SUE AND PRESENT A JUSTICIABLE CASE OR CONTROVERSY.

1. The Court of Appeals reversed the District Court's grant of summary judgment as to the composition of the CGC and the SHC "on the plain and simple ground that, without either reasonable basis or compelling interest," the composition of these intramural bodies is formulated on the basis of race.

This decision was rendered on an incomplete record consisting of some general discovery by way of requests for admissions, answers to interrogatories and production of documents. There was no trial on the merits and neither Respondents nor Petitioners presented evidence related to whether there was or was not a "reasonable basis or compelling interest" in remedial regulations for the governance of the student body at the University.

The Court of Appeals did not fully state reasons for its decision. However, it is implicit in the opinion of the panel of the Fourth Circuit, upheld on rehearing *in banc,* that the Court of Appeals viewed all racial classifications as unconsitutional, invidious discrimination. By entering summary judgment without allowing the Petitioners to state reasons and justifications for the use of remedial racial classifications, and without allowing the Respondents to show what harm they have suffered, if any, the Court in effect held that these University regulations were *per se* unlawful. The Court implicitly found that the mere adoption of the racial classifications "fouls the letter and the spirit of both the Civil Rights Acts and the Fourteenth Amendment." This decision thus allowed the Court to quickly dispose of the questions of standing and case or controversy since, by the Court's view of the law, it was not necessary for the Respondents to show they were harmed. This view would also justify the Court's "rush judgment" since, if the classifications were *per se* unlawful, "no rational basis or compelling reasons" could be shown, and therefore there was no need for an adversary hearing.

The decision of the Court of Appeals was contrary in principle to numerous decisions of this Court and the lower federal courts in that the Court disapproved any use of racial classifications and formulations in remedial settings. The purpose of the intramural regulations was to ensure that Blacks were included in the campus legislative and judicial processes. The challenged racial formulations were not used to exclude any race, but were used rather to assure that no race was excluded.

Not every remedial use of race is forbidden. This Court has approved classification by race in a variety of corrective settings.

Such classifications have been approved to achieve integration of the public schools (*Swann v. Board of Education,* 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed. 2d 554 (1971)), to uphold the right of certain non-English speaking persons to vote *(Katzenbach v. Morgan,* 382 U.S. 641, 86 S.Ct. 1717, 16 L.Ed. 2d 828 (1966)), and to provide instruction in English to students of Chinese ancestry (*Lau v. Nichols,* 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed. 2d (1974)). Recently, this Court once again looked with favor on the benign use of remedial racial classifications when it specifically relied upon Washington, D.C.'s affirmative efforts to recruit black officers in supporting its conclusion that no inference could properly be drawn that the Washington, D.C. police department had improperly discriminated on the basis of race. *Washington v. Davis,* 526 U.S. 229, 96 S.Ct. 2040, 48 L.Ed. 2d 597 (1976).

Most recently, in *United Jewish Organizations v. Carey,* 97 S.Ct. 996 430 U.S. 144, 51 L.Ed. 2d 229, (1977), this Court has indicated that racial classifications are not *per se* unlawful. Unless actual deprivation or discrimination results from the classification, no violation occurs. The *Carey* case resulted from New York's attempt to comply with the United States Attorney General's requirements for legislative redistricting, pursuant to the Voting Rights Act. In 1972, the Attorney General had refused to approve a plan to correct past districting deficiencies. A new plan was prepared pursuant to which the size of nonwhite majorities in certain districts was increased. To achieve this result, parts of the white community were reassigned to new districts. The Hasidic Jewish group was one such part of the white community. Suit was brought on behalf of this group to enjoin New York from enforcing the new plan. The District Court granted motions to dismiss, and the Court of Appeals and the Supreme Court affirmed.

The decision of this Court was based in large part on the propriety of New York's plan in the context of the Voting Rights Act. However, there was also considerable analysis in Fourteenth Amendment terms directly applicable to the case at bar. Mr. Justice White, joined by Justices Stevens and Rehnquist, stated that the New York plan was not violative of the Fourteenth Amendment, wholly independent of the impact of the Voting

Rights Act. It was emphasized that the absence of any deprivation or discrimination against whites made the New York plan permissible. Several factors were noted as showing the absence of discriminatory impact, including: (1) the fact that the plan did not "fence out" the white population from participation in the political process; (2) the fact that white voting strength was not minimized or unfairly cancelled by New York's plan; and (3) the fact that whites, as a group, were provided "fair" representation. With respect to this last consideration, Justice White stated, ". . . as long as whites in Kings County, as a group, were provided with fair representation, we cannot conclude that there was a cognizable discrimination. . ."*Carey* 430 U.S. at 166.

This reasoning is directly applicable to the present case. The rules pertaining to CGC and SHC membership in no way "fence out" white students from participation in political or judicial processes. The rules are designed to insure the participation and representation of *all* students. The fairness of representation is assured in the SHC rules by permitting every individual to be judged by a jury composed, if he chooses, of 4 members of his race or sex, and 3 persons chosen at random. This protects the defendant from racial bias, without infringing the rights of other students to participate as jurors. Similarly, the challenged CGC rule does not affect the representation of whites, since it is called into play where there is *only* white or male representation on the CGC. If this event occurs, then Blacks are *added*. No White is subsequently excluded. In essence, these rules, like the plan in *Carey*, are nondiscriminatory because they create no deprivation to any group. In the absence of actual harm, there is no cognizable discrimination and the plaintiffs are not entitled to any relief.

Further support for this conclusion is found in the other opinions filed in the *Carey* case. Mr. Justice Brennan's concurrence in the judgment is based upon the Voting Rights Act. However, his analysis is premised upon the idea that remedial uses of racial classifications are not necessarily forbidden. He states that, in determining the constitutional propriety of such classifications, it is necessary to weigh the problems of preferential race assignment practices against the need for effective social policies correcting racial inequities. Mr.

Justice Brennan's concurring opinion in *Carey*, 430 U.S. 171. Because, in his view, the Voting Rights Act strikes the proper balance, the New York plan made pursuant to that Act was valid. One balancing factor specifically mentioned was that the whites involved in *Carey* had not been deprived of their right to vote. This rationale indicates that the University's rules here are not automatically invalid because they are based upon race, and further that actual harm is a factor in the ultimate determination of propriety. Indeed, in focusing on the permissibility of using racial classifications to correct past discriminations, Mr. Justice Brennan has gone beyond the position expressed by Mr. Justice Whie. That is, his analysis does not foreclose the possibility of using remedial racial classifications even if some deprivation or discrimination resulted, provided the social need for such a policy outweighed the problems of preferential treatment. The challenged university rules, with their remedial purpose and absence of harm, are easily within the bounds of this analytical framework.

The opinion of Mr. Justice Stewart, joined by Mr. Justice Powell, also provides support for the present petitioner's position. Mr. Justice Stewart took the position that because the petitioners in *Carey* failed to show either the purpose or the effect of any discrimination against them, there was no basis for relief. He felt that because the New York plan was intended to comply with the Voting Rights Act, no discriminatory purpose was present. The absence of discriminatory effect was shown by the fact that the political power of white voters was not undervalued. The same lack of discriminatory impact is present in this case, since the rules were designed to insure representation of minorities and in fact caused no adverse consequences to anyone.

Consideration of the opinions of White, Brennan and Stewart thus discloses common themes, despite differing rationales. Each agrees to the proposition that racial classifications are sometimes permissible, and emphasizes the absence of actual harm as a bar to finding impropriety. These common aspects support the conclusion that the presently challenged University rules are permissible under *Carey*. The absence of discriminatory impact from the racial classification

indicates that the rules are proper pursuant to each analysis announced in *Carey*.. Under these circumstances, plaintiffs have stated no basis for relief.

An opinion of the Court of Appeals for Fifth Circuit, bears directly on the constitutionality of the provision which allows an honor court defendant to require that members of his race and/or sex sit in judgment on his case. The case of *Brooks v. Beto,* 366 F.2d 1 (5th Cir.) *cert. denied,* 386 U.S. 975, 18 L.Ed 2d 135, 87 S.Ct. 1169 (1966), held racial classifications could be used to assure a fair and balanced court and not violate the equal protection clause. In *Brooks,* a convicted defendant sought *habeas corpus* relief on the ground that the jury commissioners had purposely included two Blacks on the Grand Jury which indicted him. The court held there had been no denial of the defendant's equal protection or due process of the law where members of a minority race were purposely included on the panel.

This purposeful inclusion of minorities on a Grand Jury is similar to the Student Honor Court provision which provides for purposeful inclusion of minority students on an honor court. Such a provision is not discriminatory, but merely ensures that a defendant is judged by a jury representative of the community. The challenged provision allows the defendant to determine whether to include males, females, or Blacks on his jury. *All* students, including Blacks, may elect to implement the Student Honor Court provision. A system which provides better peer representation for a defendant is not a violation of anyone's consitutional rights. See also, *Mack v. Walker,* 372 F.2d 170 (5th Cir.), *cert. denied,* 393 U.S. 1030, 21 L. Ed. 2d 573, 89 S.Ct. 641 (1966), supporting *Brooks.*

Petitioners submit that the decision of the Court of Appeals holding that the racially formulated intramural practices violated the Respondents' rights under the Fourteenth Amendment and the Civil Rights Act without making findings on whether or not the Respondents suffered any loss or deprivation was erroneous.

2. Whether or not the challenged provisions relating the the CGC or SHC are violative of the Civil Rights Acts and the Fourteenth Amendment, the Respondents below lacked standing to challenge them and their claims fail to present a case or controversy to this Court pursuant to Article III, Section 2, of the United States Constitution. The decision of the Court of Appeals in which they found that a case or controversy existed (and implicitly found standing as well) was erroneous and contrary in principle to numerous decisions of this Court and the lower federal courts.

This Court has consistently refused to render advisory opinions. *United States v. Fruehauf,* U.S. 146, 81 S.Ct. 547, 5 L.Ed. 2d 476 (1961), and this Court has refused to interpret a statute when its decision would not necessarily have affected the parties. In a challenge to an abortion statute, a showing was made that a number of plaintifs' only stake in the action was that they were of child-bearing age. Holding this insufficient to support jurisdiction, this Court immediately dismissed the petition as to those plaintiffs. *Abele v. Markle,* 452 F.2d 1121 (2nd Cir 1971), *vacated per curiam,* 410 U.S. 951, 93 S.Ct. 1412, 35 L.Ed. 2d 683 (1973).

In essence, the Respondents were seeking an advisory opinion on the merits of Article I, Section 1 (D) of the Student Constitution. The Respondents having failed to allege the existence of an actual, justiciable controversy between themselves and the Petitioners as required by Article III, Section 2 of the United States Constitution, the portions of their complaint relating to the composition of the Campus Governing Council were properly dismissed by the District Court. As the Distict Court succinctly stated:

> "In a strict sense, the claim fails to state a claim or controversy because the effect of this provision is in no way discriminating toward plaintiffs. The provision allows for the appointment of blacks, women *and males* to insure representation on the CGC and while such a provision may be questioned as a matter of political values or constitutional principle, it cannot,

even when implemented, be argued to have an injurious effect on the plaintiffs. See *Wright, Miller & Cooper,* § 3531 at 200. The plaintiffs contend that the existence of the provision imposes a racial criteria in the evaluation of the members of the CGC but the Court is unable to perceive how that translates into a legal interest or cognizable injury to the plaintiffs which can form the basis of a claim raising a case or controversy suitable for adjudication."

Similarly, neither Respondent has been subject to a disciplinary proceeding before the Student Honor Courts. Their complaint fails to demonstrate that they have in any sense been injured by the constitutional provisions and enactments of the Student Legislature (predecessor body to the Campus Governing Council) allowing special appointments to the Student Honor Courts. The mere existence of procedures to ensure minority representation on the courts does not deny equal protection to the Respondents who have never come before the courts.

Although the Courts below dealt with the case or controversy question, they chose to ignore the lack of standing question. Some mention should be made of this as it applies to all of the causes of action stated by the Respondents in their complaint.

A claim may only be asserted in a Federal Court by a plaintiff who has standing to bring suit challenging the alleged violation. This is particularly true when a suit concerns the actions of a governmental agency. See *Frothingham v. Mellon,* 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923), where a taxpayer *qua* taxpayer was not allowed to challenge a Congressional appropriation; *Flast v. Cohen,* 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed. 2d 947 (1968), where a taxpayer was allowed to challenge an appropriation which allegedly violated the plaintiffs' First Amendment rights. The standing requirement seeks to ensure that Federal Courts will only entertain suits between adverse parties concretely affected by the legal issues in dispute.

Traditional standing analysis has centered on the question of whether the plaintiffs have been injured in fact by the complained of activity. Without such an injury in fact, the lawsuit becomes a mere academic exercise on the part of the plaintiffs. In *Rothblum v. Board of Trustees,* 474 F.2d 891 (3rd Cir. 1973), the plaintiff sued for admission to a state medical school claiming he had been denied admission solely on the basis of his nonresident status. The Court dismissed the action since the plaintiff could not show that lack of state residence status had caused him to be rejected, nor was he allowed to assert the claims of any others who might have been rejected solely for lack of state residency. "It is the fact of injury to the plaintiffs, not to others, which justifies judicial intervention." *Id.* at 898.

The Respondents have failed to demonstrate that the challenged racial formulations have caused them any injury in fact, or any threat of harm. The challenged racial formulations cannot be shown to burden or impair the Respondents' ability to participate in the campus political process or to receive a fair trial before the Honor Court. The Respondents have not been threatened with loss of representation, the right to vote, or the dilution of their vote. The fact that Black persons can insist that a majority of judges appointed to hear their case be Black, cannot be an actual or threatened harm to the Respondents. As the Supreme Court noted in denying standing to the Sierra Club in a challenge to the Disney development of Mineral King Valley, ". . . the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Sierra Club v. Morton,* 405 U.S. 727, 734, 92 S.Ct. 1361, 31 L.Ed. 2d 636, 643 (1972).

Recent cases, have suggested a second question beyond injury in fact involved in standing analysis. In *Association of Data Processsing Service Organizations v. Camp,* 397 U.S. 150, 90 S. Ct. 827, 25 L.Ed. 2d 184 (1970), the Supreme Court allowed an organization of independent data processors to challenge a regulation of the Comptroller of the Currency permitting banks to sell data processing services. In determining the Association's standing to sue, the Court questioned not only whether the regulation had caused an injury, but also "whether the interest

sought to be protected by the claimant is arguably within the zone of interests to be protected by the statute or constitutional guarantee in question." 397 U.S. at 153, 90 S.Ct. at 830, 25 L.Ed. 2d at 188. To make this determination, a plaintiffs' legal status must be examined in relation to the practices they challenge. In a suit asking for an injunction against enforcement of financial disclosure provisions of a state ethics code, the Seventh Circuit interpreted this requirement as calling for a determination of "whether a 'logical nexus' has been established between the status of the party and the claim sought to be adjudicated." *Council 34, American Federation of State Employees v. Ogilvie,* 465 F.2d 221, 225 (7th Cir., 1972).

In *Association of Data Processors, supra.,* the Association was able to show that the rights of competitors were protected under the Administrative Procedure Act. The Respondents in this action claim a denial of equal protection under the Fourteenth Amendment, as students, fee-payers to the University of North Carolina at Chapel Hill, and taxpayers to the State of North Carolina. None of these are logically connected to an alleged denial of equal protection in the abstract. The Respondents can only be within the zone of interests protected by the Fourteenth Amendment if they are denied equal protection in some fashion. Since their complaint fails to show any legally recognizable interest in the challenged practices beyond that of a citizen, they do not have standing to prosecute this action.

II. THE DECISION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT REVERSING THE DISTRICT COURT'S SUMMARY JUDGMENT IN FAVOR OF THE PETITIONERS AND GRANTING SUMMARY JUDGMENT FOR THE RESPONDENTS, IN A SITUATION WHERE THE PETITIONERS HAD, PRIOR TO TRIAL ON THE MERITS, MOVED FOR SUMMARY JUDGMENT ON THE QUESTIONS OF MOOTNESS AND STANDING, DENIED THE PETITIONERS PROCEDURAL DUE PROCESS OF LAW AND AN OPPORTUNITY TO PRESENT EVIDENCE SUPPORTIVE OF THE CHALLENGED REGULATIONS.

The Petitioners moved for summary judgment on the grounds that no case or controversy existed and one of the claims was moot. Petitioners did not assert that they were entitled to summary judgment on the merits nor did the Respondents. The case had not gone to trial and the parties had not presented any evidence. General discovery had taken place. The Respondents had asked the Court of Appeals only to vacate the judgment of the District Court "and remand this case for trial upon the merits." They did not ask for summary judgment in their favor.

Nevertheless, the Court of Appeals entered summary judgment for the Respondents, holding that racial classifications existed "without either reasonable basis or compelling interest." This decision denied the Petitioners the right to proceed to a trial on the merits, so as to establish the "reasonable basis or compelling interest" in the challenged racial classifications. The Petitioners submit that they should be allowed to present evidence related to discrimination at the University, if any, the need for remedial measures, and how the measures have operated.

Allowance of summary judgment against the Petitioners on the basis of this incomplete record denied the Petitioners their rights under Rule 56, F.R.C.P., and their right to procedural due process of law. This Court, sitting in its supervisory capacity, should allow the Petition.

CONCLUSION

The decision of the Court of Appeals holding that certain Univeristy of North Carolina student legislative and student judicial code provisions contain racial classifications which run afoul of the Civil Rights Acts and the equal protection clause of the Fourteenth Amendment was erroneous in that the Court failed to find that any cognizable discrimination toward the Respondents had occured. The Court found that the very enactment of the challenged provisions resulted in a violation of the Constitution, and thus ignored the distinction between the benign or harmless use of racial classifications and their invidious

use. The Court of Appeals also ignored the principle that harm is an essential predicate to standing and the existence of a real and concrete controversy.

The question of whether universities may adopt remedial racial provisions to ensure that Blacks are not excluded from campus political life is a substantial one. It is respectfully submitted that this case is of sufficient importance that this Court should exercise its jurisdiction and issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit. We believe that this Petition presents to this Court far reaching issues of the most vital public importance that must be answered.

Respectfully submitted, this 26th day of October, 1977.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of October, 1977, a copy of the foregoing Petition of Writ of Certiorari was mailed postage prepaid to:

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APPENDICES

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-2276

Lawrence A. Uzzell and Robert Lane Arrington, Individually, and upon behalf of all others similarly situated, Appellants,

v.

William C. Friday, Individually, and as President of the University of North Carolina; Ferebee Taylor, Individually and as Chancellor; Claiborne Jones, Individually and as Vice-Chancellor; Marcus Williams, President of Student Body; Timothy Dugan, Individually and Treasurer, etc.; Board of Trustees of the University of North Carolina at Chapel Hill; and Board of Governors of the University of North Carolina; and Algenon L. Marbley, Chairman of the Black Student Movement; and Robert L. Wynn, II, Vice-Chairman of Black Student Movement, Appellees.

ON PETITION OF APPELLEES FOR A REHEARING IN BANC

(Argued June 8, 1977 Decided July 28, 1977)

Before HAYNSWORTH, Chief Judge, BRYAN, Senior Circuit Judge, WINTER, BUTZNER, RUSSELL, WIDENER and HALL, Circuit Judges.

Hugh J. Beard, Jr. for Appellants; Andrew A. Vanore, Jr., Senior Deputy Attorney General (Rufus L. Edmisten, Attorney General of North Carolina on brief) for Appellees; (Karen Bethea Galloway, James V. Rowan, Paul, Rowan & Galloway on brief) for Defendant-Intervenors.

OPINION ON REHEARING IN BANC

Albert V. Bryan, Senior Circuit Judge:

Upon rehearing in banc, the opinion heretofore filed in this appeal, 547 F.2d 801 (4 Cir. 1977), is confirmed with two additions:

(1) A statement will be included in Section II of the opinion, as it appeared in the first order denying a panel rehearing, viz, that after the decision of the District Court but before this appeal came on for argument the Student Constitution provision for appointment by the President of the Student Body, with the consent of the Campus Governing Council, of up to two members of the minority race as Councillors, in the event that the annual election had secured Council office for fewer than two such members, had been invoked and satisfied by appointment of a black student as a Councillor.

(2) To the citations at 547 F.2d at 803, line 10, will be added that of Carter v. Jury Commission of Greene County, 396 US 320, 329 (1970), for the point that plaintiffs herein have standing to sue.

The Clerk is now directed to enter an order affirming the panel decision, 547 F2d at 801, subject to the additions noted above, and reversing and remanding the judgment of the District Court consistent with that decision.

WINTER, Circuit Judge, with whom HAYNSWORTH, Chief Judge, and BUTZNER, Circuit Judge, join, concurring and dissenting:

I would affirm the order of the district court in its entirety, for the reasons sufficiently stated in the district court's opinion. Uzzell v. Friday, 401 F.S. 775 (M.D.N.C. 1975).

I.

I agree with the majority that the district court cannot be faulted for concluding that the issue of university funding of the Black Student Movement is moot.

As to the issue of the validity of the university regulations which allow the student body president to appoint two black members to the Campus Governing Council if two have not been elected, I think that plaintiffs lack standing to sue because there is no actual or threatened injury to them. They have not been threatened with loss of representation as whites. They have not been denied the right to vote; nor has the weight of their vote been diluted. They have not been denied the right to seek election and to win. The fact that potential black appointees may cast the deciding vote on a close issue before the Council, in derogation of plaintiffs' interest, is too remote and speculative for serious consideration.

Finally, as to the issue of the validity of the regulation permitting an accused before the Honor Court to request that a majority of the judges reflect his race and sex (white, black, male, or female), I think that plaintiffs have failed to establish standing to sue and have failed to show a case or controversy, i.e. an actual dispute reflecting competing interests. This regulation does not discriminate; *any* student may request majority representation of that student's race and sex. Surely a non-offender, of a race or sex different from the accused, has no right or privilege to insist that the accused be judged by less than the peers of the accused. Conversely in a geographical area where racial discrimination has been known, the university has an interest in the appearance of justice, as well as justice in fact.

II.

On the merits of the case, I and some of my brothers are outvoted. This is understandable, but what is totally inexplicable is that the majority rushes to final judgment without affording the defendants either their rights under Rule 56, F. R. Civ. P., or elemental procedural due process of law.

When defendants moved for summary judgment, they did so on the grounds that plaintiffs' claims were moot, that plaintiffs' claims failed to establish a case or controversy, that plaintiffs had failed to exhaust their administrative remedies and that the plaintiffs lacked standing to sue. Defendants did not assert that on the merits they were entitled to *summary* judgment and plaintiffs made no such claim either. Indeed, even before us, plaintiffs ask only that we vacate the judgment of the district court "and remand this case for trial upon the merits."

Of course, in a proper case, a trial court may render a summary judgment *against* a party who has moved for summary judgment in his favor, even though the opposing party, to whom summary judgment is granted, did not file a cross motion. And I do not dispute that an appellate court, in a proper case, may do the same thing. But this is not a proper case in which the power we possess should be exercised.

In the record before us, there was some general discovery by way of requests for admissions, answers to interrogatories and production of documents, but I do not read them to tell the whole story of the history of discrimination or non-discrimination at the university, the need for remedial measures, the reasonableness of the measures and how, in practice, they have operated. I think that these are all factors bearing on the ultimate merits. Certainly the parties, as well as the district court, did not and do not treat the record as complete for purposes of final adjudication on the merits. Even if the majority thinks otherwise, I suggest that in the sensitive, expanding area of the law of racial discrimination, the majority should recognize that it is not unlikely that the majority's view of the merits may not be the final say and that in equity and good conscience, the parties should be given the opportunity to make the record on which they must stand or fall.

Until it reached us, the case was litigated and decided on procedural or preliminary grounds not dispositive of the merits. By converting the case into a final adjudication on the merits when neither party contemplated or requested it and when neither party has had the opportunity to present any additional relevant proof, the majority denies to the losing party, as well

as the party prevailing, the very rights that we have assiduously preserved for uncounseled litigants in summary judgment actions, Roseboro v. Garrison, 528 F.2d 309 (4 Cir. 1975)–fair notice and an opportunity to respond. The majority thus violates Rule 56 and denies procedural due process of law. Surely the parties, including the State of North Carolina, deserve fairer treatment.

From the majority's partial reversal, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-2276

Lawrence A. Uzzell and Robert Lane Arrington, Individually, and upon behalf of all others similarly situated,

Appellants,

v.

William C. Friday, Individually, and as President of the University of North Carolina; Ferebee Taylor, Individually and as Chancellor; Clairborne Jones, Individually and as Vice-Chancellor; Marcus Williams, President of Student Body; Timothy Dugan, Individually and Treasurer, etc.; Board of Trustees of the University of North Carolina at Chapel Hill; and Board of Governors of the University of North Carolina; and Algenon L. Marbley, Chairman of the Black Student Movement; and Robert L. Wynn, II, Vice-Chairman of Black Student Movement,

Appellees.

Appeal from the United States District Court
for the Middle District of North Carolina,
at Durham. Eugene A. Gordon, Chief Judge.

(Argued June 10, 1976 Decided January 5, 1977)

Before BRYAN, Senior Circuit Judge, WIDENER, Circuit Judge, and KUNZIG, Judge, United States Court of Claims*.

Hugh J. Beard, Jr. for Appellant; Andrew A. Vanore, Jr., Senior Deputy Attorney General, Karen Bethea Galloway (James V. Rowan, Paul, Rowan and Galloway; Rufus L. Edmisten, Attorney General of North Carolina, on brief) for Appellees.

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*Sitting by designation

Albert V. Bryan, Senior Circuit Judge:

In controversy in this appeal is the legality of the following practices at the University of North Carolina: (1) the continuance of an allotment to the Black Student Movement (BSM), a student organization, of a share in the mandatory Student Activities Fees required to be paid the institution on enrollment; (2) limitations based solely upon race on the appointment and membership of minority representatives in the Campus Governing Council; and (3) restrictions based exclusively on race for appointments to the Student Honor Court.

A suit to nullify these intramural practices was commenced on June 13, 1974 in the District Court by two current students, Lawrence A. Uzzell and Robert Lane Arrington, as a class action, naming as defendants William C. Friday, President of the University, its officers and its Board of Trustees. The Chairman and Vice-President of the BSM were later added as defendants.

These practices were assailed as contravening the Fourteenth Amendment, the Civil Rights Act of 1871, 42 USC 1983, and the Civil Rights Act of 1964, Title VI, 42 USC 2000d.[1] As will appear more particularly *infra*, the general

[1] "§ 1983. *Civil action for deprivation of rights*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

"§ 2000d.

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

offensiveness ascribed to the usages is that they contemplate racial qualifications that cause the plaintiffs to suffer disadvantages at the University because they are not of the favored race. As this differentiation derives from the action of a State agency[2]—the University—which admittedly receives Federal financial assistance in the form of grants and contracts, these detriments could constitute deprivations and discriminations condemned in the cited constitutional and statutory safeguards.[3]

Examining each of the practices in this light, we affirm the District Court's summary judgment on defendants' motions as to financial support of the Black Student Movement but reverse the summary judgments as to minority representation on the Council and the Honor Court.[4]

With the District Judge we see the plaintiffs as having standing to prosecute each of these claims. *See* United States v. SCRAP, 412 US 669, 686-87 (1973). Moreover, his rejection of the defendants' motion to dismiss for plaintiffs' failure to exhaust State administrative remedies is accepted under the holding of McCray v. Burrell, 516 F2d 357 (4 Cir. 1975), cert. dismissed as improvidently granted, ____ US ____, 44 LW 4860 (No. 75-44, June 14, 1976).

Student Government

The President of the Student Body of the University is the chief executive officer of the student government. Since 1972, its legislative branch has taken the form of a Campus Governing Council (CGC) of 18 members. They are elected annually by and from the student body and each student in good standing, like the plaintiffs, is eligible to vote in the

[2] Arrington v. Taylor, 380 FS 1348 (MDNC 1974), *aff'd in unpublished opinion* (4 Cir. August 4, 1975) (No. 74-2080).

[3] Jurisdiction is afforded here by 23 USC 1331 and 1343 as the suit involves a Federal question and civil rights.

[4] Our disposition of the case renders superfluous consideration of the appropriateness of the litigation as a class action. See footnotes 5 and 7 *infra*.

election of its members. The judicial branch includes the Honor Court of the Student Body (SHC).

I. Black Student Movement

In 1967 a group of students formed the Black Student Movement to promote black culture and identity among black students. The organization was officially recognized by the University and was permitted to use the latter's facilities. It was also assigned office space in the Student Union Building. Since 1969, with the exception of the 1970-71 academic year, the BSM has received yearly appropriations–ranging from $6,400 to $12,000–from funds derived from the Student Activities Fees. The money thus provided has been used to support many programs of the organization, including cultural and entertainment events as well as publication of a newspaper, *Black Ink*.

Upon its inception the BSM adopted a constitution stating that "Any Black student can be a member of the BSM." Similarly, as revised in 1971, it declared that "The members of the Black Student Movement shall be every Black student enrolled in the University of North Carolina at Chapel Hill." Now, through amendment in September 1974, the pertinent article provides that members of the BSM shall include any student whose views are consistent with the goals of the BSM. So, say the defendants, BSM membership is open to all students supporting its aims. Accordingly, the District Court held the plaintiffs' charges to be moot, dismissing them for that reason.

The District Judge made fact findings that adequately underprop this holding: aside from the BSM's own curative rescission of the race qualification, the actions and representations of the defendants, including the University, are cited to demonstrate the absolute removal of the exclusivity of black membership. In denying relief, he concluded that the indications and probability for future reinstitution of the discrimination showed apprehension thereof too remote to warrant equitable measures. We are satisfied to affirm on these

assurances of the District Judge. Uzzell v. Friday, 401 F.Supp. 775, 777-79 (MDNC 1975).[5]

II. Campus Governing Council

Plaintiffs challenge the Student Constitution's provisions for membership on the Council as violative of their civil rights in that it stipulates that the Council shall include "at least two Councillors of a minority race within the Student Body (if any), two male Councillors and two female Councillors". They further provide that, in the event an annual election does not produce such representation, "the President of the Student Body, with the consent of the Council, shall make the number of appointments necessary to ensure compliance with this section."

The trial court dismissed for lack of the constitutional jurisdictional exaction–that there be an actual case or controversy–in this aspect of the plaintiffs' grievances. 401 FS at 779-81. First, it was noted that these organizational prescriptions of the CGC had never been activated and that consequently "no rights of the plaintiffs have been affected". Again, the Court on this theme concluded that these features of the CGC were "in no way discriminating toward plaintiffs" for they ensure representation on the CGC to all classes–blacks, women and males. As an overall reason, however, the Court felt " 'there is no sufficient need for deciding the issues. . . .' Wright, Miller & Cooper, § 3529 at 153". 401 FS at 780.

We cannot affirm the dismissal, but rather find that plaintiffs stated a justiciable cause of action. We reverse now

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[5]Since we affirm the decision of the District Judge as to the BSM, we agree with him that consideration of the appropriateness of this aspect of the litigation as a class action is unnecessary. Our holding today is therefore limited to the named plaintiffs and does not affect the rights of other members of the alleged class. Nevertheless, we concur with the District Judge's admonition of defendants that "if the University should intentionally or unintentionally again begin to fund any racially exclusive organization or should the BSM not be truly open to members of all races while it receives state funds, the Court will not be reluctant to entertain this same law suit." 401 F.Supp. at 779.

on the plain and simple ground that, without either reasonable basis or compelling interest, the composition of the Council is formulated on the basis of race. This form of constituency blatantly fouls the letter and the spirit of both the Civil Rights Acts and the Fourteenth Amendment. A reading of them, particularly Section 2000d, is all that is needed for authentication of this conclusion. See footnote 1, *supra.* Additionally, *see*: McDonald v. Santa Fe Trail Transportation Co., ___ US ___, 44 USLW 5067 (June 25, 1976); Lige v. Town of Montclair, ___ NJ ___, ___ A2d ___ (Nov. 30, 1976) (No. A-107); Bakke v. Regents of the University of California, ___ Cal.2d ___, 553 P2d 1152, 132 Cal. Rptr. 680 (1976).

III. Student Honor Court

Since October 2, 1974 an accused has been permitted to request that four of the seven judges on the trial bench of an Honor Court be of his or her race or, in the alternative, of his or her sex.[6]

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[6]The University's Instrument of Student Judicial Governance of 1974 provides, in pertinent part:

"e. Trial Courts

* * * *

2) If requested by the defendant, provision shall be made for racial or sexual representation (but not both) on the trial court, as follows:
   a) At least four of the seven members of the trial court shall be of the same sex as the defendant;
   b) When a defendant is not a member of the majority race, at least four of the seven members of the trial court shall not be of the majority race;
   c) When a defendant is a member of the majority race, at least four of the seven members of the trial court shall be of the majority race.
3) Each trial court shall be selected by the Court Administrator under the procedures described below.

* * *

   d) If the defendant has requested racial or sexual representation on the trial court, the members of the trial court shall be selected by random drawing from the pool of the entire court panel of a number not to exceed that which will permit the sexual or racial representation requested; and by random drawing from another pool appropriate to insure that representation."

Plaintiffs' challenge to this article of student government was dismissed by the District Judge upon the same grounds as he struck down the present provisions for CGC composition–lack of case or controversy. 401 FS at 781-82. For the same reasons as we disagreed there with the District Court's judgment we do so here: the selection of the SHC panel is related to race with no reasonable or compelling nexus to that classification.

Summary

In summary we affirm the decision of the District Court as to the funding of the Black Student Movement but reverse the District Court's grant of summary judgment as to the composition of the Council and the Honor Courts.[7] Although the plaintiffs did not move either this Court or the District Court to grant summary judgment in their favor, we clearly have power to do so. Appellees' briefs contain nothing to

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[7]Although we are inclined to the view that the CGC and SHC aspects of this litigation could appropriately go forward as a class action under FRCP 23(a) and (b), *see* Potts v. Flax, 313 F2d 284, 289 (5 Cir. 1963), it is not necessary to reach the class action issue.

> "By the very nature of the controversy, the attack is on the unconstitutional practice of racial discrimination. Once that is found to exist, the Court must order that it be discontinued. [While the decree] . . . might name the successful plaintiff as the party not to be discriminated against, . . . that decree may not–either expressly or impliedly–affirmatively authorize continued discrimination by reason of race [or sex] against others."

Id. (citation omitted). Thus any error in determination of the appropriateness of class action here would be harmless since the decree for all practical purposes would be the same whether entered on behalf of the alleged class or confined to named plaintiffs. *Id.* at 289-90.

suggest that we should not follow that course of action if we determine to reverse and, while the affidavits are in conflict on some points, none of these inconsistencies has dispositive significance in the view we take of the case.[8]

Accordingly, we think it is "just under the circumstances" for this Court to remand with directions that the District Court enter summary judgment for the plaintiffs. Morgan Guaranty Trust Co. v. Martin, 466 F2d 593, 600 (7 Cir. 1972), *quoting* 28 USC 2106.

Affirmed in part, reversed in part, and remanded with directions.

[8]*Compare* Abrams v. Occidental Petroleum Corp., 450 F2d 157, 165-66 (2 Cir. 1971), *aff'd sub nom.* Kern County Land Co. v. Occidental Petroleum Corp., 411 US 582 (1973) *and* Morgan Guaranty Trust Co. v. Martin, 466 F2d 593, 599-600 (7 Cir. 1972) *with* Fountain v. Filson, 336 US 681 (1949) *and* Kern County Land Co. v. Occidental Petroleum Corp., 411 US at 605, 614-17 (Douglas, J., dissenting); *see* 6 Moore's Federal Practice 56.27[2], 56.12.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

LAWRENCE A. UZZELL and ROBERT LANE ARRINGTON, Individually, and upon behalf of all others similarly situated, Plaintiffs	)
v.	) NO. C-74-178-D
WILLIAM C. FRIDAY, Individually, and as President of the University of North Carolina; FEREBEE TAYLOR, Individually and as Chancellor; CLAIBORNE JONES, Individually and as Vice-Chancellor; MARCUS WILLIAMS, President of Student Body; TIMOTHY DUGAN, Individually and Treasurer; BOARD OF TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL; and BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, Defendants	) JUDGMENT
and	
ALGENON L. MARBLEY, Chairman of the Black Student Movement and ROBERT L. WYNN, II, Vice-Chairman of Black Student Movement, Additional Defendants	

For the reasons set forth in a Memorandum Opinion entered contemporaneously herewith, it is

ORDERED, ADJUDGED AND DECREED that

1. the motions of the defendants and the defendant-intervenors for summary judgment on the first, second, seventh

and eighth claims for relief be granted on the grounds of mootness; and

2. the motion of the defendants for summary judgment on the third, fourth, ninth and tenth claims for relief be granted on the grounds of lack of case or controversy and non-justiciability; and

3. the motion of the defendants for summary judgment on the fifth, sixth, eleventh and twelfth claims for relief be granted on the grounds of lack of case or controversy and non-justiciability.

/s/ Eugene A. Gordon
United States District Judge

September 16, 1975

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

LAWRENCE A. UZZELL and ROBERT LANE ARRINGTON, Individually, and upon behalf of all others similarly situated, Plaintiffs	)	
v.	)	NO. C-74-178-D
WILLIAM C. FRIDAY, Individually, and as President of the University of North Carolina; FEREBEE TAYLOR, Individually and as Chancellor; CLAIBORNE JONES, Individually and as Vice-Chancellor; MARCUS WILLIAMS, President of Student Body; TIMOTHY DUGAN, Individually and Treasurer; BOARD OF TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL; and BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, Defendants	)	
and	)	
ALGENON L. MARBLEY, Chairman of the Black Student Movement and ROBERT L. WYNN, II, Vice-Chairman of Black Student Movement, Additional Defendants	)	

MEMORANDUM OPINION

GORDON, Chief Judge

This case is before the Court on defendants' motion to dismiss or alternatively for summary judgment in an action brought by two students at the University of North Carolina at Chapel Hill challenging certain practices of the University and the Campus Governing Council (CGC) as violations of the Fourteenth Amendment and 42 U.S.C. §§ 1983 and 2000d. While there are twelve causes of action alleged, the plaintiffs in essence challenge three separate practices:

(1) the disbursement of funds collected from mandatory student fees to the Black Student Movement (BSM), a group composed exclusively of black students whose membership policies are allegedly discriminatory and whose purpose is allegedly the promotion of a separate racial and cultural identity;

(2) the provisions for minority representatives on the Campus Governing Council (CGC) authorizing appointment and membership solely upon the basis of race; and

(3) the provision for appointment to the Student Honor Court solely on the basis of race.

The plaintiffs allege this suit to be a class action and seek declaratory and injunctive relief.

The plaintiffs allege that each of the three above practices of the University are violations of 42 U.S.C. § 1983 in that they deny plaintiffs equal protection of the laws, and of 42 U.S.C. § 2000d in that the practices deprive the plaintiffs of full participation in and the equal benefit of the University, a "program or activity receiving Federal financial assistance." The defendant University and the BSM, defendant-intervenors, move to dismiss, or in the alternative, for summary judgment, on the grounds that the claim concerning BSM subsidization should be dismissed as moot or for lack of standing; that the claim concerning CGC representation be dismissed for lack of cause

and controversy and the claim challenging honor court appointment be dismissed for lack of standing.[1]

These issues will be resolved on the defendants' summary judgment motions since the Court will consider the many affidavits and answers to interrogatories in the record which are pertinent to the motions before the Court.

The issues before the Court raise questions of substantial difficulty which have not apparently been ruled on by other courts. The defenses of lack of standing and case and controversy make resolution particularly troublesome since they compel consideration of imprecise constitutional doctrines in a case involving claims of a largely unprecedented nature. As a result, this memorandum opinion, sailing an uncharted course, will inevitably pitch and toss in trying to steer between complex constitutional questions and unprecedented applications of § 1983 and § 2000d.

I.

The Court turns first to the issue of mootness with respect to plaintiff's claim concerning disbursements to the BSM. The BSM is an organization at the University "that recognizes the distinctly different cultural and historical evolution of the Black community vis-a-vis that of the broader society . . ." and whose goals are "to strive for the continued existence of unity among all [BSM] members on this campus; offer outlets for expressing Black ideas and culture; and . . . to insure that . . . [BSM] members on the campus . . . never lose touch with the culture of the Black Community." (Preamble to the Constitution of the Black Student Movement.) From its inception in 1967 until September, 1974, the membership policy of the BSM was exclusive to black students at the University. On September 18,

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[1]The defendants also move to dismiss all claims for failure to exhaust administrative remedies and to dismiss the class aspect of the case for failure to satisfy Rule 23 requirements. The exhaustion argument cannot be seriously considered in light of McCray v. Burrell, No. 74-1042 (4th Cir. 1975) and the class action argument need not be considered because of the resolution of the other motions.

1974, the membership policy was amended to allow any student, regardless of race, to be a BSM member if the views of the applicant are consistent with the goals of the BSM as stated in the Preamble. (Art. III, A. Black Student Movement Constitution, Resolution of September 18, 1974.) At present, all the members of the BSM are black.

The defendants contend that the present nondiscriminatory membership policy and the intent of both the BSM officials and University officers, as evidenced by affidavits, ensure a non-exclusive membership policy and, thus, render this claim moot. At the hearing, the attorney for the BSM stated that the new membership policy is truly open and non-exclusive, that no one has ever been turned down for membership and that the purposes and goals of the BSM, while of course focused on the black experience at the University and black culture, are not inconsistent with integrated membership policies. Finally, the defendant University, while conceding that the mere cessation of the challenged illegal activity does not moot the challenge, argues that the University policy of prohibiting disbursement of student funds to a racially exclusive organization is so clear and its commitment to implementation of the policy so unequivocal that the case is moot since there is no possibility of a recurrence of the challenged activity.

The plaintiff contends the controversy is not moot on several grounds, both factual and legal. Firstly, the plaintiff argues that the membership policy is still exclusive since the condition of membership requiring adherence to the preamble and the review of membership applications by a BSM membership committee allow for effective control of non-black membership and potential discrimination. The plaintiff argues that, in light of the past history of exclusive membership, the conditions for membership and the present all black membership amount to de facto exclusivity or raise at least a presumption of discrimination which should allow plaintiff's claim to withstand the mootness defense. Secondly, the plaintiffs assert that even if the BSM membership policies are no longer exclusive, the case should not be judged moot unless it is reasonably clear that the wrongful activity will not recur. In support of their position that there remains a cognizable danger

of a recurrent violation, plaintiffs point to the funding of the BSM by student government with the approval of University officials for several years while the organization was racially exclusive. They point out that this funding was done with knowledge of the exclusivity and that the membership policy only changed after institution of this suit. They argue that the cessation of the activity and the declaration of intent not to reinstitute the policy is not sufficient to render this controversy moot.

The first determination on this issue is a factual one. The language of the new constitutional provision regarding BSM membership and particularly the language of the September 18 resolution manifests a clear intent to allow membership in the BSM on a non-discriminatory basis. Moreover, the affidavit of the Chairman of the BSM clearly expresses the membership policy of the BSM to be without regard for race. It is concluded that the BSM has changed its membership policy from black exclusivity and discrimination against whites to a stated policy of open membership subject to the condition of adherence to the Preamble.

Careful consideration of the University and student government policies also disclose a change from a policy which apparently allowed the subsidization of racially discriminatory organizations to one which clearly prohibits such funding. The affidavit of Marcus Williams, the Student Body President, states the policy of Student Government to be that all student organizations must operate under an open membership policy without regard to race and declares the intent to terminate the funding with student fees of any organization violating that policy. This statement of policy is confirmed by the affidavit of the Treasurer of the Student Government and Dean Donald Boulton, the Dean of Student Affairs.

Furthermore, this policy of subsidizing only organizations whose membership is non-exclusive and open is mandated by The Revised North Carolina State Plan for the Further Elimination of Racial Duality in the Public Post-Secondary Education Systems adopted on May 31, 1974, by the Board of Governors of the University of North Carolina (see affidavit of

John P. Kennedy, Jr.). These unambiguous promulgations of present University policy with regard to the subsidization of campus organizations and BSM policy as to membership compel the conclusion that the activity challenged by plaintiffs in their first, second, seventh and eighth claims for relief has ceased and that it is the clearly declared intent of the defendants and intervenors that it not be reinstituted.

This brings on for determination a legal question; that is, whether cessation of the challenged activity renders the controversy with respect to this challenged practice moot. While there is some dispute as to the proper standard for finding mootness when the defendant has discontinued the challenged acts, "the test of mootness is whether the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated." Wright, Miller & Cooper, *Federal Practice and Procedure*, Vol. 13, § 3533 at 282; *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953). As the commentators state, the prediction of possible recurrence of the challenged activity is often difficult and must to some degree depend on "individualized judgment and intuition." Wright, Miller & Cooper, at 282-83. However, in the area of official action, courts have been more receptive to declarations that abandoned illegal policies will not be reinstated particularly when, as in this case, the challenged policy is terminated altogether and not just its application in particular circumstances. Wright, Miller & Cooper, at 283-85. Cf. *Blackwell v. Thomas*, 476 F.2d 443, 445-46 (4th Cir. 1973).

The Court concludes that the clearly stated directives and policies of the University, filed with the Department of Health, Education and Welfare and acquiesced in by the student officials charged with their implementation, to terminate funding to any organization with discriminatory membership policies meets the burden of showing "no reasonable expectation" of recurrence.

The apparent sincerity of all involved and the written promises or policies not to reinstitute the challenged activities along with the visibility of the defendants and their action preclude a serious danger that the challenged practices will be

reinstituted. The Court shares plaintiffs' legitimate concern raised by the past subsidization of the BSM when its membership was exclusive. The Court strongly condemns the approving University officials and the student government officials who, with apparent knowledge, for several years disbursed funds collected from mandatory student fees to an organization whose membership policy clearly excluded everyone except black students. However, the membership policy of the BSM has changed and the policy of the University has come full circle to an unequivocal refusal to fund any racially exclusive organization, perhaps as a result of this lawsuit as plaintiffs contend. For this reason, summary judgment is granted for defendants and defendant-intervenor, BSM, on the first, second, seventh and eighth claims for relief on the ground of mootness. The Court hastens to tell the plaintiffs and to admonish the defendants that if the University should intentionally or unintentionally again begin to fund any racially exclusive organization or should the BSM not be truly open to members of all races while it receives state funds,[2] the Court will not be reluctant to entertain this same lawsuit.

II.

The plaintiffs' challenge the minority representation provision of the Student Constitution which requires that there be at least two blacks, two women and two men on the Campus Governing Council (and if this number is not elected, the President of the Student Body must appoint members of such race or sex to comply with the requirement). The defendants seek summary judgment on this claim because of the undisputed fact that the provision has never been utilized since its enactment and, consequently, they argue there exists no case or controversy with respect to this claim.

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[2] A truly open and non-exclusive membership policy requires more than a mere paper promise. The BSM must neither discourage, subtly or discreetly, non-black membership in their organization nor may they use the condition of adherence to the BSM preamble to control non-black membership. There should be a presumption that all who seek membership are eligible to join and should be accepted. Any indication of discrimination by the BSM in its membership policies would be grounds for giving this lawsuit renewed vitality.

The defendants' motion is granted for two reasons. The first is the one pressed by them that this provision has never been used and therefore no rights of the plaintiffs have been affected. This renders the claim hypothetical and the impact of any decision would have no direct effect on the status of the litigating parties.

However, there is a more fundamental reason for dismissing the claim for lack of case or controversy. The plaintiffs contend that 42 U.S.C. § 1983 and § 2000d guarantee them a right to attend a state university free from officially imposed or sanctioned discrimination and that a taxpayer or feepayer should not be compelled to subsidize a university which imposes or sanctions discrimination. They argue that these rights were violated at the moment the provision was adopted since, at that point, the defendants began using racial criteria in evaluating representation on the CGC. This argument, it is concluded, does not raise a case or controversy which is appropriate for resolution by this Court.

In a strict sense, the claim fails to state a claim or controversy because the effect of this provision is in no way discriminating toward plaintiffs. The provision allows for the appointment of blacks, women *and males* to ensure representation on the CGC and while such a provision may be questioned as a matter of political values or constitutional principle, it cannot, even when implemented, be argued to have an injurious effect on the plaintiffs. *See* Wright, Miller & Cooper, § 3531 at 200. The plaintiffs contend that the existence of the provision imposes a racial criteria in the evaluation of the members of the CGC but the Court is unable to perceive how that translates into a legal interest or cognizable injury to the plaintiffs which can form the basis of a claim raising a case or controversy suitable for adjudication.

On a less technical level, the Court feels summary judgment should be granted on this claim, not necessarily pursuant to any specific judicial doctrine, but because the claim

does not warrant judicial review.[3] The Court adopts the following reasoning:

> "There is no reason to demand a final expression in terms of standing, ripeness, mootness, or political question doctrine, if the court is able to conclude that there is no sufficient need for deciding the issues tendered without relying on the frequently question-begging terminology of any single concept." Wright, Miller & Cooper, § 3529 at 153.

It is the opinion of the Court that the issue raised by this claim is not appropriate for judicial relief and that the denial of judicial relief will cause no hardship to any party. Wright, Miller & Cooper, § 3259 at 141. It is felt that the challenge to the CGC provision is not appropriate for judicial relief because it would involve the Court in a purely policy determination, the resolution of which would have no effect on the status or welfare of the parties involved. The policy of CGC appointment deserves neither judicial approval or condemnation for, as it stands now, it does not affect the rights or interests of any student at the University to a degree which is traditionally susceptible of judicial remedy.

Therefore, summary judgment is granted in favor of the defendants on the third, fourth, ninth and tenth claims for relief on the grounds that the claim challenging the CGC appointment provision does not state a claim or controversy and is not justiciable. The Court is aware of the fact that the area of justiciability and doctrines such as case and controversy, standing and mootness afford a court substantial discretion to refuse to review a case which it does not wish to entertain. However, the Court firmly believes that the issue raised in the third and fourth claims for relief is precisely the kind of matter for which the justiciability doctrine may be most appropriately invoked.

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[3]The belief that the claim is not justiciable in a broad sense does not indicate concern about the decision to grant summary judgment on the more tangible case and controversy theory. It is felt that both grounds are equally convincing.

III.

The plaintiffs, in their fifth and sixth claims for relief, challenge the provision which allows for the appointment of members of the Student Honor Court on the basis of race. The Student Honor Court is a judicial body entrusted with trial and punishment powers in matters of student discipline. Its members are elected and appointed, but if requested by a defendant before the Honor Court, provision is made for racial or sexual representation which involves the appointment as court judges of four persons (out of a total of seven) of the defendant's race and/or sex.

The defendants contend plaintiffs lack standing to raise this challenge since they cannot demonstrate any injury resulting from these provisions. Adopting the standard set forth in *Association of Data Processing Serv. v. Camp*, 392 U.S. 150 (1970), that the interest sought to be protected by the claimant must be within the zone of interests protected by the statute or constitutional provision invoked, the defendants advocate dismissal on the grounds that plaintiffs cannot prove denial of equal protection which is the interest protected by 42 U.S.C. § 1983 and § 2000d.

The plaintiffs assert standing as students, taxpayers to the State and feepayers to the University contending they should be allowed to attend a state-supported university free from officially imposed or sanctioned racial discrimination and not be compelled, as taxpayers and feepayers, to subsidize a racially discriminatory program or activity. Plaintiffs also cite recent United States Supreme Court cases to the effect that a person need have only a little stake in the outcome of the litigation to maintain a suit and that those who are not the direct objects of discrimination nonetheless may have standing to challenge discriminatory practices. *United States v. SCRAP*, 412 U.S. 669 (1973); *Trafficante v. Metropolitan Life Ins.*, 409 U.S. 205, 210 (1972).

While the Court is inclined to agree with the plaintiffs on the standing issue because of the significant relaxation of the standing requirement in *SCRAP* and *Trafficante*, it is concluded that this challenge to the honor court provision should be

dismissed for the reasons the claim concerning CGC representation was dismissed in Part II.

Firstly, the claim challenging honor court appointments does not state a case or controversy since the appointment provision does not discriminate against anyone. It may be invoked by all students, black and white, male and female, and while such a provision may be questioned on the grounds of political or social desirability or even judicial impartiality, it does not have the effect of discrimination. In the *Trafficante* case, the plaintiffs were not the objects of the alleged discrimination, but their challenge under the Fair Housing Act to the rental practices of the apartment in which they lived was found to present a case or controversy in that they did allege racial discrimination against others who sought housing in their unit. 409 U.S. at 211-12. The subject case is distinguishable, however, in that the practices challenged here do not discriminate against the plaintiffs or anyone else at the University. Therefore, while the Court would agree that plaintiffs have standing to challenge discriminatory practices imposed or sanctioned by the University, even if these practices do not directly or seriously affect them, this claim must be dismissed for failure to state a case or controversy.

Secondly, the Court feels this claim, similar to the challenge to CGC representation, is not justiciable since the issue is not appropriate for judicial review and the denial of review will not impose a hardship on any of the litigating parties. While the claim is a maverick in that it cannot be neatly classified as a political question, advisory litigation or a moot controversy, it does not raise issues for resolution which would have anything more than a very nominal impact on the rights or interests of the litigating parties. Judicial review of this claim would be more akin to an academic exercise than a substantial legal dispute. Therefore, summary judgment is granted in favor of the defendants on the fifth, sixth, eleventh and twelfth claims for relief on the grounds that the claims do not present a case or controversy and are not justiciable.

It is realized that the resolution of the CGC and honor court disputes in this manner, if upheld, effectively precludes

the possibility that these practices can ever be ruled upon in a court of law. While the potential scope of 42 U.S.C. § 2000d is still uncertain[4] and the coverage of 42 U.S.C. § 1983 expanding, the Court is of the opinion that the claims raised by the plaintiffs do not state a case or controversy even within the most liberal interpretation of those statutes.

Accordingly, a judgment will be entered.

/s/ Eugene A. Gordon
United States District Judge

September 16, 1975

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[4]It is not clear to what extent Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d) will ultimately allow private parties to remedy discrimination or compel desegregation in federally funded activities. Antieau, *Federal Civil Rights Act*, § 138 at 182. An enumeration of practices which would violate 42 U.S.C. § 2000d, set forth by a leading commentator, arguably includes the CGC and honor court provisions challenged here in that they subject individuals to different treatment because of race. Antieau, § 137 at 181-82. However, the practices challenged here neither encourage discrimination or discourage racial integration in any way and, therefore, do not, it is concluded, state a case or controversy under the most liberal reading of 42 U.S.C. § 2000d. *Cf.* Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973).

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-635

WILLIAM C. FRIDAY, Individually, and as President of the University of North Carolina, et al.,
Petitioners,

v.

LAWRENCE A. UZZELL and ROBERT LANE ARRINGTON, Individually, and upon behalf of all others similarly situated,
Respondents.

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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OPINIONS BELOW AND JURISDICTION

The Petition accurately states the opinions below in its Appendix, and the statute under which the jurisdiction of this Court is invoked. The opinion of the Court of Appeals for the Fourth Circuit, in banc, is now reported at 558 F.2d 727.

QUESTIONS PRESENTED

I. WHETHER TWO STUDENTS HAVE STANDING TO CHALLENGE STUDENT GOVERNMENT REGULATIONS AT A STATE UNIVERSITY WHICH EXCLUDE THEM FROM APPOINTMENTS TO THE CAMPUS LEGISLATURE AND WHICH EXCLUDE THEM FROM APPOINTMENTS TO A CAMPUS DISCIPLINARY TRIAL COURT BECAUSE OF THEIR RACE, AS BEING IN CONFLICT WITH THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964.

II. WHETHER THE DECISION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT REVERSING THE DISTRICT COURT'S SUMMARY JUDGMENT FOR THE PETITIONERS AND GRANTING SUMMARY JUDGMENT FOR THE RESPONDENTS, WHERE THE PETITIONERS ALONE HAD MOVED FOR SUMMARY JUDGMENT, WAS ERROR IN CONFLICT WITH THE RULES OF CIVIL PROCEDURE.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Petition accurately states the Constitutional Provisions, Statutes and Rules involved in this proceeding.

RESTATEMENT OF THE CASE

On June 13, 1974, two students at the University of North Carolina at Chapel Hill, a state institution receiving federal financial aid, brought an action in the United States District Court asking declaratory and injunctive relief against three University practices as being in violation of the Fourteenth Amendment, the Civil Rights Act of 1871, 42 U.S.C. 1983, and the Civil Rights Act of 1964, 42 U.S.C. 2000d. The suit challenged first the subsidization of the Black Student Movement, a campus organization found by the Court below (Petition at A23) to have excluded white students from membership until soon after this suit was filed.

Secondly, it questioned a provision of the Student Government Constitution which requires that there be at least two Black students as members of the Campus Government Council (CGC). Should this number not be elected, or should the resignation or removal of a Black member leave fewer than two Black members on the CGC, then the President of the Student Body is required to appoint one or two additional members. The President may choose any student, so long as the student is Black. Any white student, male or female, is excluded from the list of possible appointments.

The third practice challenged is a provision of the Instrument of Judicial Governance, a regulation adopted jointly by the Student Government and the University. This regulation formalized a practice in effect since 1970, and requires that upon the request of a Black Defendant, who is being tried before the Student Honor Court (SHC) (a judicial body entrusted with the trial and punishment of students) four Blacks would be appointed to the seven judge court which would hear the case. The members of the SHC would be appointed from a body composed of twenty-eight elected members and fourteen appointed members, twelve of whom must also be Black.

In discovery, four past Presidents of the Student Body at the University of North Carolina at Chapel Hill, two of whom are Black, stated that during the school years between 1972 and 1976, two Blacks were chosen by elec-

tion as members of the Campus Governing Council. In 1976, only one Black was elected and a Black student was therefore appointed pursuant to this provision. In 1972, ten Black students were members of the body from which the Honor Courts are chosen, out of a total of forty-two members at which time there was no required minimum representation of Blacks. In 1974, twelve Black students held this office. The President of the Student Body who initiated the move in 1970 to provide for the black quota on the SHC stated that his purpose in so doing was to ensure that "justice was not only done, but was perceived to have been done." The President of the Student Body who initiated the proposal for a minimum number of Black members of the CGC stated that his purpose in so doing was to ensure "protective representation" of Blacks on the CGC. No suggestion was made in the proceedings below that there had been any racial discrimination upon the part of the Student Government of the University of North Carolina at Chapel Hill, nor by the University of North Carolina Administration in connection with the Student Government.

After the parties had engaged in considerable discovery with respect to federal financial aid to the University, the effect of the challenged practices, and the number of Blacks holding office in the CGC and the SHC before and after the adoption of the practices, the Petitioners, herein referred to as the Defendants, moved for summary judgment, which motion the District Court granted. The District Court held that the claims relating to the Black Student Movement were moot in that, following the commencement of the action, the Black Student Movement had opened its membership to white students, and the court was assured that this discrimination would not reoccur. The court held that the Plaintiff had standing to challenge the practices regarding the CGC and the SHC, but that they had not presented a justiciable case or controversy.

The Respondents, herein referred to as the Plaintiffs, appealed. The Court of Appeals for the Fourth Circuit affirmed the granting of summary judgment in favor of the Defendants with regard to the financial subsidy by the University of the Black Student Movement, but reversed the summary judgment ruling on the question of minority representation on the CGC and the SHC, and remanded with directions that the District Court should enter summary judgment for the Plaintiffs on these two issues. The Defendants filed a timely petition for rehearing before the Court of Appeals *in banc*, upon the basis that "the defendants should be given the opportunity to present evidence before either this Court or the District Court in support of their decisions with respect to the appointment and membership of minority representatives in the CGC and for appointment to the SHC." The Defendants, in their petition, did not further elaborate on what evidence they would present before the Court of Appeals or the District Court.

The motion for rehearing was denied on February 18, 1977, and the mandate of the court issued. Thereafter, on March 24, 1977, the Court, upon its own motion, recalled the mandate, reconsidered the denial of rehearing, and ordered rehearing *in banc*. Upon rehearing the Defendants filed a supplemental brief, wherein they stated the issue to be "did the court err in granting Defendants' motion for summary judgment on the issues concerning the CGC and the SHC because the Plaintiffs are in no way deprived or discriminated against from the classifications and therefore no cognizable discrimination which would warrant relief is present?" In arguing this issue, the supplemental brief does not give any suggestion as to what problems or deficiencies the Defendants sought or might have sought to remedy and what compelling state interest they sought or might have sought to promote by the racial discrimination practiced under the challenged regulations.

Upon rehearing *in banc*, an order was issued affirming the decision of the three judge panel subject to certain additions. Judges Winter, Haynsworth and Butzner dissented.

Defendants applied for a stay of mandate on August 12, 1977, and on September 30, 1977, the stay was granted by the Court of Appeals, pending disposition of this petition for certiorari.

1. WHETHER TWO STUDENTS HAVE STANDING TO CHALLENGE STUDENT GOVERNMENT REGULATIONS AT A STATE UNIVERSITY WHICH EXCLUDE THEM FROM APPOINTMENTS TO THE CAMPUS LEGISLATURE AND WHICH EXCLUDE THEM FROM APPOINTMENTS TO A CAMPUS DISCIPLINARY TRIAL COURT BECAUSE OF THEIR RACE, AS BEING IN CONTRAVENTION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964.

A. Plaintiffs Clearly Satisfy the General Test of Standing as Articulated by This Court.

The Defendants have contended that the Plaintiffs have no standing because they were purportedly not excluded from or discriminated against in connection with the programs in question. This is simply not the case. Under the regulations enforced by the University of North Carolina at Chapel Hill, white students are excluded from twelve seats on the forty-two member body from which trial committees are chosen and from four seats on the University trial court committee which tries a Black student, who does not wish to be tried by a racially non-discriminatory court. The procedure specifically pro-

vides that, upon request of a Black defendant, four of the seven members of the court which will try him are chosen from a "pool". The "pool" is composed of the potential judges who are Black. All white students are excluded from this "pool". A Black Defendant may thereby entirely exclude the possibility of being tried by a white majority court. White students are further excluded from consideration when additional members of the CGC are appointed because of an insufficient number of Blacks. The President of the Student Body makes appointments only from among Black Students.

The function of the standing doctrine is to ensure that suits are brought by a person who is the proper party to request an adjudication of a particular issue.

> "Thus, in terms of Article III limitations on federal court jurisdiction the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution . . . . Our decisions establish that, in ruling on standing, it is both appropriate and necessary to look to the substantive issues for another purpose, namely, to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Flast v. Cohen*, 392 U.S. 83, 101-102.

In *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970), the Court established a two-fold test of standing. "The first question is whether the Plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise." 397 U.S. at 152. Second, the injury must be to an interest of the Plaintiff with which interest, "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.... That interest,

at times, may reflect 'aesthetic, conservational and recreational' as well as economic values." 397 U.S. at 153-154. Even spiritual interests will suffice. 397 U.S. at 154.

In the more recent decision of *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), the Court further defined and utilized the test established by *Association of Data Processing Service Organizations v. Camp, supra*. The action there challenged was the allowance of a proposed increase in railroad rates for recyclable commodities by the Interstate Commerce Commission. The Plaintiffs were, according to their allegations, persons who had used the "...forests, streams, mountains, and other resources of the Washington metropolitan area for camping, hiking, fishing, and sight-seeing, ..." 412 U.S. at 685. They alleged that they were injured because, "... a general rate increase would allegedly cause increased use of non-recyclable commodities as compared to recyclable goods, thus resulting in the need to use more natural resources to produce such goods, some of which resources might be taken from the Washington area, and resulting in more refuse that might be discarded in the national parks of the Washington area." 412 U.S. at 688. This was found to allege, "... a specific and perceptible harm that distinguished them from other citizens..." 412 U.S. at 689.

The question of standing, therefore, as the District Court correctly stated, is the question of whether the interest of the Plaintiffs which are threatened or injured by challenged state practices and sought herein to be protected is within the zone of interests protected by the statute and constitutional provision invoked. The Plaintiffs contend that Title VI seeks to protect the right of all persons who participate in programs subsidized by the

central government to be free from racial discrimination in their enjoyment of those programs and benefits. They contend that the Fourteenth Amendment, enforced through the Civil Rights Act of 1871, seeks to protect the right not to be compelled to subsidize, through mandatory student fees, a racially discriminatory program, and the right to attend a state supported institution of higher education which is free from officially sanctioned and imposed racial discrimination. Both provisions seek to protect the right not to be excluded from an office, even a student government office, upon the basis of race.

The Plaintiffs, among all other students at the University, have these rights, and the practices and provisions of the Defendants violate these rights.

B. Plaintiffs Satisfy the Specific Tests of Standing to Bring Actions Under 42 U.S.C. 1983 and 42 U.S.C. 2000d.

Both the District Court (Petition at A26-27) and the Court of Appeals (Petition at A9), found that the Plaintiffs had standing to challenge the validity of these regulations. When the President of the UNC Student Body made appointments to the CGC and the SHC pursuant to the challenged provisions, he passed over the Plaintiffs and did not consider appointing them, solely because of their race. When the responsible officers of the SHC made appointments from the already racially appointed SHC, to trial courts trying a Black, in choosing four of those seven judges, they passed over the Plaintiffs, again solely because of their race. This is the same nature of injury which was suffered by the Plaintiffs in *Carter v. Jury Commission of Greene County*, 396 U.S. 430 (1970), and *Turner v. Fouche*, 396 U.S. 346 (1970), a deprivation of a civil and political right on account of race.

The Defendants claim that the fact that the Plaintiffs have not been subject to disciplinary proceedings shows that they have not been injured by the racial discrimination in the selection of the SHC, and therefore lack standing to challenge the selection procedure.

This Court, in *Carter v. Jury Commission of Greene County*, *supra*, held that each citizen has a right not to be excluded from service upon a jury because of his race.

> "Defendants in criminal proceedings do not have the only cognizable legal interest in non discriminatory jury selection. People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion. Surely there is no jurisdictional or procedural bar to an attack upon systematic jury discrimination by way of civil suit such as the one brought here. The federal claim is bottomed on the simply proposition that the State, acting through its agents, has refused to consider the appellants for jury service solely because of their race. Whether jury service be deemed a right, a privilege, or a duty, the State may no more extend to some of its citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise. Once the State chooses to provide grand and petit juries, ... it must hew to federal constitutional criteria in ensuring the selection of membership is free of racial bias." 396 U.S. 320, 329-30.

More recently, Mr. Justice Powell, in his dissent in the case of *Castaneda v. Partida*, 430 U.S. 482 (1977), stated,

> "Were it not for the perceived likelihood that jurors will favor defendants of their own class, there would

> be no reason to suppose that a jury selection process that systematically excluded the persons of a certain race would be the basis of any legitimate complaint by criminal defendants of that race. *Only the individual excluded from jury service would have a personal right to complaint.*" 430 U.S. at ____, 97 S.Ct. 1272, 1291 (1977) (emphasis added).

The Plaintiffs contend, that by clear analogy, each student has a right not to be excluded from service upon the SHC, which is analogous to the petit jury and the grand jury of the court systems of the states of Alabama and Texas.

With regard to the exclusion of the Plaintiffs from appointment to the CGC, the Court in *Turner v. Fouche*, *supra*, said as follows:

> "We may assume that the appellants have no right to be appointed to the ... board of education. But the appellants and the members of their class do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications. The State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees." 396 U.S. at 362-63.

The Plaintiffs do not contend they have a right to be appointed to either the CGC or SHC, but they believe that they have a right not to be excluded from the list of potential appointees because of their race. Because they are excluded from this program, denied its benefits and, refused participation, because of their race, they are denied the equal protection of the laws guaranteed by the Fourteenth Amendment.

The decisions of this court, and the courts below, have been unanimous in holding that students have standing under 42 U.S.C. 1983 to challenge racial discrimination in extra curricular activities sanctioned or imposed by school authorities. *See, e.g., Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

Further arguments supporting the standing of the Plaintiffs to bring this action are found among the Federal Regulations adopted to enforce Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d. Title VI prohibits racial discrimination against any person. The statute "tolerates *no* racial discrimination, subtle or otherwise." *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 281 note 8 (1976) (emphasis by the court); *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 801 (1973).

The regulations adopted by the Department of Health, Education and Welfare immediately following the enactment of Title VI reflect that the Plaintiffs plainly fall within the zone of interests sought to be protected by the Act.

45 CFR 80.3(b) (iv) provides that one may not lawfully "... restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program." (Effective as of January 5, 1965).

45 CFR 30.3(b) (vii), adopted eight years later, provides that one may not lawfully "... deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program." (Effective as of July 5, 1973).

45 CFR 80.13(g) defines a "benefit" of a program to include "any ... benefit provided with the aid of federal

financial assistance ... and any ... benefits provided in or through a facility provided with the aid of federal financial assistance..."

In *Lau v. Nichols*, 414 U.S. 563 (1974), non-English speaking chinese students claimed that the San Francisco Unified School District was providing them with unequal educational opportunities in violation of Title VI. This court sustained the allegation of discrimination, and implicitly recognized the standing of a person subjected to the discrimination and the denial of the benefits, to bring a civil action. See also *Boissier Parish School Board v. Lemmon*, 370 F.2d 847, 851-52 (5th Cir.), *Natonabah v. Board of Education*, 355 F.Supp. 715, 724 (D.N.M. 1973). Title VI seeks to protect all citizens in the same situation as the Plaintiffs, that is, all persons being excluded from a program which receives federal funding.

On the question of standing, the Plaintiffs clearly have met the tests set forth by this Court, and there is no question of law of sufficient importance which ought to be resolved by this Court involved.

2. WHETHER THE DECISION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT REVERSING THE DISTRICT COURT'S SUMMARY JUDGMENT IN FAVOR OF THE PETITIONERS AND GRANTING SUMMARY JUDGMENT FOR THE RESPONDENTS, WHERE THE PETITIONERS ALONE HAD MOVED FOR SUMMARY JUDGMENT, WAS ERROR IN CONFLICT WITH THE RULES OF CIVIL PROCEDURE.

The decision of the Court of Appeals, *in banc*, that summary judgment ought to be granted for the Plaintiffs

can be supported on several theories of the law. Each of these theories is consistent with the holding of this Court and with the decisions of the several courts of appeal. Each of these theories finds ample support in the record which was before the court below.

A. There is no State Interest Sufficiently Compelling in These Circumstances Which Will Justify the Unequal Burdening of a Person Because of His Race Under the Fourteenth Amendment.

This court has ruled that a state regulation which discriminates among citizens upon the basis of their race is suspect and can only be justified if the same is necessary to promote a compelling state interest. *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944).

A regulation which does not promote such a compelling state interest and is not necessary in its entirety to promote such an interest is void as a violation of rights guaranteed by the Fourteeneth Amendment. *Dunn v. Blumstein*, 405 U.S. 330, 343-4 (1972); *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 192-93 (1964).

The Courts have held that the remedying past government racial discrimination is a compelling state purpose which will temporarily justify racial classifications. E.g. *Swann v. Charlotte-Mecklenburg Board of Education*, *supra*; *United Jewish Organizations of Williamsburg, Inc. v. Carey*, 430 U.S. 144 (1977). In these cases, however, the Courts, while utilizing racial classifications and statistics in framing a remedy, did not place unequal burdens upon either race, or exclude any citizen from the programs in question because of their race. In contrast to the facts

here, racial discrimination in the particular circumstances was alleged and found, either by the judicial or, in *Carey*, *supra*, by the legislative branch, and the need for remedial racial classification determined prospectively by the appropriate governmental agency.

In no case since the Japanese cases in World War II has the court sustained the burdening of one group upon the basis of their race, even for remedial purposes. See *Franks v. Bowman Transportation Company, Inc.*, 424 U.S. 747 (1976).

B. There is No Governmental Interest Sufficiently Compelling to Rationalize Discrimination Under Title VI.

The Plaintiffs would contend that under the provisions of Title VI of the Civil Rights Act of 1964, racial discrimination can be utilized, if at all, only for remedial purposes when found necessary for that purpose by a federal court. The federal government has established through this statute, that a necessary condition for receipt of federal funds is that there shall be no racial discrimination of any kind or for any reason in any program or facility which receives or utilizes those federal funds. Congress, by this statute, has determined that there are no compelling governmental interests sufficient to justify racial discrimination in programs receiving federal funds. This judgment of the Congress cannot be overruled, modified, or construed except perhaps by federal courts, and must necessarily prevail over any decision, however benign and beneficial, by a local government body, a state legislature, or a student council. To permit otherwise would allow a local legislative body to substitute its own values and priorities for that of the federal government in matters concerning the spending of federal money.

The case of *United Jewish Organizations of Williamsburg, Inc., v. Carey, supra*, which the Defendants have invoked, clearly relies upon a particular statute, the Voting Rights Act of 1965, to justify the use of racial criteria to equalize the voting strength of Blacks as a whole, and the finding that no individual was unequally burdened and, therefore, that no individual was subjected to discrimination, because of their race. In this case, individuals are, in fact, burdened unequally because of their race, and the statute in question, Title VI of the Civil Rights Act of 1964, clearly prohibits racial discrimination.

C. Any Rationalization of Racial Discrimination Must Have Been Made Prospectively.

In order to meet the test of a compelling state interest the Defendants must show that the purpose and justification for regulation which enforces a distinction made on the basis of race was actually the motivation for its enactment, not merely a post-facto rationalization. A purpose never considered or adopted by the proper authoritative agency of the State's power cannot supply a compelling interest or even a rational basis for a state enactment. *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *United Jewish Organizations of Williamsburg, Inc. v. Carey*, 510 F.2d 512, 530 (2nd Cir. 1974) (Frankel, D.J., dissenting).

The discrimination cannot be accomplished thoughtlessly or covertly, then justified after the fact. The Defendants cannot sustain their burden of justification by coming to court with an array of hypothetical and post-facto rationalizations for discrimination that has already occurred either without their approval or without their conscious and formal choice to discriminate as a matter of official policy. It is not for the court to discover and articulate a rational or

compelling basis (or something in between) to sustain the questioned state action. That task must be done by appropriate state officials *before* they take any action.

D. The Prospective Rationalizations Advanced by the Defendants are Insufficient to Justify Racial Discrimination.

The only two justifications for racial discrimination, that the discovery, brief, and motions, suggest might have been proposed at the time of the enactment of these regulations are that the quotas in the CGC were enacted to provide "protective representation", and that the racial majority provisions on the SHC were enacted to provide for "the appearance of justice". No other justification was advanced under any guise contemporaneously with the enactment of the regulations in question.

To exalt "protective representation" for Black students to the status of a compelling state interest, and similarly to exalt "the appearance of Justice" for Black students, contravenes the facts as well as the law. During the 1972-1976 period, Blacks held, at one time or another, all of the high offices of student government: Two of the four Student Body Presidents, the "Chief Justice of the Student Supreme Court" during the entire period, at least two members of the CGC elected each year except 1976, and one elected that year. Blacks possessed sufficient political pull to secure substantially disproportionate appropriations totalling over $40,000.00 between 1969 and 1975 to a campus organization, the "Black Student Movement" which the Court below found to have an all black membership and to have excluded whites from applying for membership until three months after the filing of this civil action.

Black students hardly needed protective representation. The record further discloses no absence or wanting of actual justice in the student disciplinary hearings, nor even an allegation of the same, but the record does disclose that not even all black students have felt it necessary to request a "racial majority court". The proponents of the racial courts wish to promote "the appearance of justice", where actual justice is not questioned by those concerned. No court has ever recognized such purported interests of the state to have the status of a"compelling state interest." No citation is made to support the contention. Further, the concept of "protective representation", either in the SHC or the CGC, is founded on a concept of racial solidarity rejected by this court in *Castaneda v. Partida*, 430 U.S. 482. These two "interests" hardly rise to meet the test of a "rational basis" let alone the stringent standards of a "compelling state interest." *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Cf. Dunn v. Blumstein*, *supra*; *Loving v. Virginia*, *supra*; *McLaughlin v. Florida*, *supra*.

E. The Retrospective Rationalization Advanced by the Defendants is Insufficient to Justify Racial Discrimination.

In retrospect, the Defendants have attempted to rationalize the SHC provisions upon grounds that "such a provision ... merely ensures that a defendant is judged by a jury representative of the community ... [by] a system which provides better peer representation for a defendant..." (Petition at 12).

Such a justification is based upon the proposition that a jury composed of a majority of the same race as the

Defendant is necessary to provide an impartial jury of one's peers. If such a regulation be necessary to promote this compelling state interest, then any jury selection system which does not provide racial majority representation in each jury necessarily therefore fails to achieve that same compelling state interest, a jury of one's peers. For if such a system of racial quotas is necessary at UNC, then it is necessary throughout the nation. If such a system is not necessary in all courts, someof which have been proven to have practiced racial discrimination in the selection of juries in the past, then it is hardly necessary to promote this admittedly compelling state interest at Carolina. This requirement of racial representation on juries is contrary to the holdings of this Court in *Alexander v. Louisiana*, 405 U.S. 625, 628 (1972); *Carter v. Jury Commissioners of Greene County*, *supra*, and *Hernandez v. Texas*, 347 U.S. 475, 477 (1954), which specifically deny that any racial representation on a jury is necessary for a trial by a jury of one's peers.

The regulations certainly cannot be upheld on these grounds, and any evidence supporting such a rationale would be irrelevant to the question of the justification of racial discrimination.

F. The Rationalization of Racial Discrimination, if any, Was Made by an Unauthorized and Improper State Agency.

The record does not disclose that the Board of Governors of the University of North Carolina, the Board of Trustees of its Chapel Hill Branch, or the President or Chancellor, have ever considered a decision to discriminate upon the basis of race as a matter of official policy in connection with these regulations. If there was such a decision, it was made by the Student Government alone.

However, the Student Government at the University of North Carolina at Chapel Hill is hardly the agency entrusted by the State of North Carolina with the responsibility of determining, articulating and promoting "compelling state interests." The record shows its powers as prescribed by regulation to be somewhat more modest. It therefore cannot invoke the power of the state to promote "compelling state interests," in order to justify its acts and decisions. *Hampton v. Mow Sun Wong*, 96 S.Ct. 1895, 1905-06, 1910 (1976); *Sweezy v. New Hampshire*, 354 U.S. 234, 251-54 (1967).

The Student Government therefore had no authority to make such a decision, and any evidence of its acts, being ultra vires in the most thorough sense, could not justify racial discrimination.

G. *Racial Discrimination Violates a Fundamental University Regulation.*

If there were compelling state interest which the proper officials of the University were seeking to advance through quotas and racial discrimination, it would seem highly suspect that the basic regulations of the University (entitled "The Code") fail to disclose them. See *Bakke v. The Regents of the University of California*, 18 Cal. 3d 34, 553 P.2d 1152 (1977). Indeed, according to the Code, which was before the court below, the most compelling state interest would be the absence and the elimination of racial discrimination at the University, not its purported remedial use.

The Code of the University provides:

"Section 103. Equality of Opportunity in the University. Admission to, employment by, and promotion

in the University of North Carolina and all of its constituent institutions shall be on the basis of merit, and there shall be no discrimination on the basis of race, color, creed, religion, sex, or national origin."

It is by now familiar law that an agency's violation of its own regulations may in and of itself constitute a violation of the rights of the Plaintiffs. *United States v. Nixon*, 418 U.S. 683, 695-96 (1974); *Vitarelli v. Seaton*, 359 U.S. 535, 545 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-67 (1974); *United States v. Leahey*, 434 F.2d 7 (1970); *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959). "An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down." *United States v. Heffner*, 420 F.2d 809, 811 (4th Cir. 1969). Such deviations "... cannot be reconciled with the fundamental principles that ours is a government of laws, not men." *Hammond v. Lenfest*, 398 F.2d 705, 715 (2nd Cir. 1958). It is irrelevant that a policy may be "more generous than the constitution requires." *United States v. Heffner*, 420 F.2d at 812; *Service v. Dulles*, 354 U.S. at 388.

As the record now stands, therefore, the University has formally enacted a policy by which it rejected race as a proper criteria for decision making in the University. There is, then, no legal basis for conflicting regulations which discriminate upon the basis of race which have been made by the Student Government, a subordinate agency of the University. A regulation promoting a purported compelling state interest enacted by any University official which is in conflict with this fundamental regulation would therefore be void, and could not justify racial discrimination.

H. *To Show Harmful Error, the Defendants Must Have Presented a Legal Theory of a Compelling State Interest Justifying Racial Discrimination and Supported by Evidence, Which was Not Considered Below.*

Throughout the proceedings in this law suit, the Defendants have defended their practices upon the basis that they did not discriminate against the Plaintiffs, and, therefore, did not have any obligation to justify their regulations.

Even though the existence of such a justification would be a matter of affirmative defense and avoidance, and the burden of proving the sufficiency of the defense would be clearly upon the Defendants, no such compelling state interest was plead in the Answer. Fed. R. Civ. P 8(c); See 5 *Miller and Wright, Federal Practice and Procedure*, §1271.

In their petition for rehearing, the Defendants first claimed that they could and would show the Court of Appeals that they had a legal theory supported by evidence not considered below to present the court concerning a purported purpose of remedying past discrimination and other compelling state interests which as a matter of law justified the discriminatory regulations. However, upon rehearing, in their supplemental brief, they disclosed no such theory, no such compelling state interest, and no such remedial intentions. They merely denied again that they had ever practiced racial discrimination against the Plaintiffs. The Court of Appeals therefore had no opportunity to determine whether their previous grant of summary judgment for the Plaintiffs had excluded possibly material evidence from consideration. *Palmer v. Hoffman*, 318 U.S. 109, 116, 118 (1943); *Shachtman v. Dulles*, 225 F.2d 933, 943 (D.C. Cir. 1955).

The Defendants have yet to suggest, in the pleadings, briefs, motions, affidavits or responses to discovery, what compelling state interest (other than the three possibilities casually mentioned in their Petition and in the brief below) caused them to enact the two racially discriminatory regulations. Nowhere have they suggested that there are legislative or judicial findings, minutes, transcripts, documents or other evidence which support a claim that the decision to discriminate was made for such an as yet undisclosed lawful purpose. Rather, the Defendants, "... submit that they should be allowed to present evidence related to discrimination at the University, *if any*, the need for remedial measures, and how the measures have operated." (Petition at 17, emphasis added).

If error by the Court of Appeals is to be shown, the Defendants must at least submit, if not plead, that there is actual evidence of racial discrimination in the operation of student government and student discipline at the University of North Carolina at Chapel Hill, and a conscious and formal decision by the appropriate authorities to remedy the same through the challenged regulations, not merely that there *might be* such evidence. The Defendants must at least submit, if not plead, that there is actual evidence of a decision to adopt the challenged policies for the purpose of promoting a legally sufficient compelling state interest, not merely that there *might be* such evidence. *See, Palmer v. Hoffman, supra; Funding Systems Leasing Corp. v. Pugh*, 530 F.2d 91 (5th Cir. 1976); *Baker v. Chicago, Fire & Burglary Detection, Inc.*, 489 F.2d 953 (7th Cir. 1973); *Green v. James*, 473 F.2d 660 (9th Cir. 1973); *Shachtman v. Dulles, supra*, 5 *Wright and Miller, Federal Practice and Procedure*, §1278.

Since the Defendants have never revealed the theory upon which they would justify their regulations as a matter of law, they can hardly be heard to contend that the Court of Appeals committed prejudicial error in declining to remand for the presentation of evidence which is not necessarily sufficient as a matter of law to justify their act and which the Defendants are not themselves certain they can ever produce. For error to be prejudicial, the legal theory must be valid and the unconsidered evidence must be more than hypothetical.

CONCLUSION

The Plaintiffs in this law suit have been excluded from certain appointments to offices under the University of North Carolina solely because of their race. This subjected them to racial discrimination and denied to them the equal protection of the laws, in violation of the Civil Rights Act of 1964 and the Fourteenth Amendment. The injury which they suffered thereby is precisely the harm which both provisions were enacted to prohibit, and their right to challenge the University regulations is clear.

In the course of these proceedings, the Defendants have mentioned three possible rationalizations for their regulations, none of which were considered by the appropriate University officials, none of which are consistent with fundamental University regulations, and none of which are legally sufficient to justify racial discrimination. The Defendants now ask for still another opportunity to articulate some as yet undisclosed compelling state interest as a justification of their actions. This desire, however, does not make this case sufficiently important to warrant the exercise of this Court's jurisdiction by the issuance of a Writ of Certiorari.

Respectfully submitted, this 5th Day of January, 1978.

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